United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6555

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,004

JERRY CARR, JR., Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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[This case has not been before this Court previously.]

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Defendant-Appellant, Jerry Carr, Jr., appeals his conviction for first degree murder and assault with a dangerous weapon.

The grand jury returned a three-count indictment charging that on March 5, 1968, defendant murdered Genevieve Strong with a knife (22 D.C. Code § 2401) and assaulted Genete M. Swails and Vivian A. Murray with a knife (22 D.C. Code § 502). The jury, rejecting the defense of insanity, found defendant guilty on all three counts after a nine-day trial presided over by the Hon. John J. Sirica. The jury's verdict on the first count specified punishment by life

imprisonment. Thereafter, Judge Sirica sentenced defendant to life (with eligibility for parole only after twenty years) on the first count, three to ten years on the second count, and three to ten years on the third count, the sentences on the second and third counts to run concurrently with the sentence on the first count.

The slaying of Genevieve Strong, defendant's estranged mistress, was a crime of passion: defendant stabbed her thirty-two times. At trial the issues posed by the defense were whether defendant was sane at the time and, if so, of what degree of homicide defendant was guilty. (Tr. 209, 230, 1115).

The jury could have found that the decedent, Genevieve Strong, was living in poverty in an apartment in Northeast Washington with her three children, having separated from her husband some months previously. Defendant, having recently been released from Lorton, became attached to Genevieve -- or "Poppy" as she was called -- and found a room nearby through the assistance of Poppy's family. He spent a great deal of time in her apartment, baby-sitting with her children at times when she was working, and sleeping there. (Tr. 20-21, 30-33, 36, 59-60, 63, 108-110, 147-49, 181-82, 226, 782). Defendant had become increasingly jealous, however, of the attention paid to the decedent by the younger men who

were present at parties and at other times at the nearby apartment of the decedent's younger, unmarried sister, Vivian (Tr. 150-52, 188-90, 207, 727-28).

Defendant killed Poppy on Tuesday morning, March 5, 1968, at about 8 a.m. in Vivian's apartment after a tumultuous week-end. Poppy spent Saturday afternoon at Vivian's apartment drinking beer and listening to records. Upon her return to her apartment, she was unable to give an account of her whereabouts satisfactory to defendant, and he beat her about the face and kicked her in the genital area. Vivian telephoned Poppy afterward and took it upon herself to come get Poppy and the children, accompanied by a young male friend, and bring them back to her apartment. (Tr. 14, 40, 122-24, 155, 158, 160, 166, 185-85c, 193).

Somewhat later Saturday evening there was a knock at the door and defendant called through the door to Vivian that he had some things of Poppy's and if she didn't come home in fifteen minutes he was going to burn her clothes.[1/] After defendant had left, the occupants of Vivian's apartment looked outside the door and found two dresses and a coat belonging to the decedent. Poppy dressed, and she and Vivian

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1/ The testimony was that these clothes were extremely expensive and with a hi-fi were all the things that she had left from her former, more affluent life with her husband (Tr. 30-31, 109).

were driven back to Poppy's apartment, which defendant had set afire. The police were there and talked to all three. Apparently the presence of the police resulted in the noticing of a counter conference at municipal court for Tuesday morning. (Tr. 32, 42, 126-33, 165, 168, 170-73, 185E-L, 192). Later Saturday night Poppy was taken to D. C. General Hospital by ambulance for treatment of bleeding from the vagina and released (Tr. 40, 169, 172).

On Sunday defendant tried without success to reach Poppy by telephone (Tr. 13-14, 44).

On Tuesday morning at 7:45 defendant came up behind Poppy's mother as she was entering her front door, stuck an object in her back and forced her into the house, where he demanded to talk to Poppy (Tr. 7, 17-19, 92-93, 96). Poppy's sister Bernadette, 11 years old, piped up and said that Poppy was at Vivian's. Defendant grabbed up Bernadette's coat from the bannister -- at which point a knife in his hand was visible -- and told her to come with him. As the two started out the door the telephone rang, and defendant returned to cut the cord with a knife he was holding in his hand. As he left, he turned to the girls' mother, who had followed him out the door, and said, "If you try to follow me, you'll never see her alive again." (Tr. 7-12, 17-19, 20, 48-50, 75-77, 93).

He marched Bernadette up the street to Vivian's

apartment, and instructed her to knock on the door and say it was Bernadette. When the two reached Vivian's apartment, Bernadette did so. When the door was opened by Vivian, defendant forced his way in and demanded of Vivian at knifepoint where "the other girl" (Vivian's roommate) was. (Tr. 52-53, 80-83, 95, 97-98, 134-36, 175-77, 185-M, 194-95).

At this point, Poppy and the roommate fled away from the defendant into the bedroom. Defendant ran after them, and they attempted to shut the bedroom door. He forced his way in, pulled Poppy from behind the door, and stabbed her. He turned to Caroline and said, "You're next." She fled. Defendant and Poppy wrestled on the floor, during which he stabbed her thirty-one more times. He left the apartment and walked down the street to a pay 'phone, where he called police. He told the patrolman answering the call, "I think I killed my girlfriend." (Tr. 84-86, 136, 138, 180-99, 201, 209-10, 226).

The defense called two psychiatrists, a psychologist, and a lay witness in support of the insanity defense. Dr. Oscar Legault, a private psychiatrist, was defendant's principal expert witness. He testified that defendant suffered from a mental disease, the chief characteristics of which were that defendant at times had virtually no control over his anger ("practically no fuse at all"), that his anger could be triggered by a triviality, that he reacted with extraordinary violence "outside the pall of ordinary human experience", and

that he had a hazy recollection of his violent actions. (Tr. 254-59, 289-90, 318-19, 350, 365, 369, 388-89, 467). He classified defendant as an "emotionally unstable personality," but also said that he could fit into the classification of passive-aggressive personality disorder (Tr. 253-54, 374-75). Defendant's disease, he testified, could be classified as "an impulse disorder." (Tr. 259).

In support of his diagnosis he recited defendant's history of teenage purse-snatchings for non-monetary motives, his enjoyment of violence in the Army, his shooting at his wife over a trivial matter, his desertion from the Air Force because of frustration over being assigned to KP, his knifing his wife's face -- which wounds required 120 stitches to close -- because she refused to account to him for $5, his engaging in risky armed robberies as a discharge of anger, his slashing of a fellow inmate at Lorton over a verbal insult to defendant's mother, his continuing to engage in armed robberies while working at the D. C. Department of Corrections as a key punch operator after release from Lorton, his burning the decedent's clothes as an expression of rage, his stabbing decedent 32 times, and his hazy recollection of the stabbing. (Tr. 260-65, 267-, 270, 318, 343, 347-56, 360-64, 475-76, 478).

The defense's experts gave great weight to the fact that the defendant had established an emotionally

necessary and satisfying relationship with Poppy, which was deteriorating, deterioration which he felt unable to control or compensate for (Tr. 269, 551, 564, 969; cf. 824-25).

In Dr. Legault's opinion, the whole issue at stake on that Tuesday was whether Poppy was going to talk to him. He could not take the frustration of her leaving without her talking to him.2/ (Tr. 265-69, 417, 421). Poppy inflamed him by running away from him. This act, Dr. Legault testified, brought defendant to the peak of a crescendo of emotion that had been building all weekend, and at this point defendant's behavioral controls were impaired to such an extent that he was not in any control at all. He was experiencing primitive rage, i.e., he was berserk. He was not conscious of right and wrong. (Tr. 287-90, 371, 376, 386, 388, 470-77, 533-34).

Dr. Eugene Stammeyer, a clinical psychologist, testified that defendant suffered from a severe personality disorder, viz., an emotionally unstable personality with a

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2/ "...on his way down to the police station...he turned right around and went out to 'Poppy's' mother's house...and at knifepoint forced the girl to take him to where 'Poppy' was.
"Now what was the object of that? To see 'Poppy' and to talk to her. 'Poppy' was not to be allowed, no one was to be allowed, not to talk to him when he wanted to talk to them.
"So far as I can determine from talking to him, he had no intention in mind to injure her, no plan of killing her, no plan other than to go there and to see that she would talk to him. Make her!" (Tr. 268; 417-18, 420-21, 426).

passive dependent quality. It was Dr. Stammeyer's opinion that at the time of the slaying defendant was "in a very severe rage at this point and I think lashed out and stabbed out in an uncontrollable way". (Tr. 553-54, 563, 656).

Dr. Wilbur A. Hamman testified defendant had been suffering since adolescence from a severe character neurosis. "In terms of description he is an extremely passive aggressive individual, he is extremely unstable individual...." (Tr. 694, 716).

Dr. Hamman offered the jury considerable insight into the dynamics of defendant's mental function at the time of the slaying, and he offered an opinion as to the significance of defendant's being met at the door to the apartment by Vivian, whom he regarded as an evil force trying to separate Poppy from him, and the significance of Poppy's running from him rather than being willing to talk (Tr. 706, 772, 785, 794).

Dr. Hamman offered his opinion that the mental disease was the prime motivating factor at the time of the crime, that defendant was "possessed" and unable to control his action (Tr. 704-06).

The defense's lay witness, defendant's landlady, testified that defendant acted depressed and retarded (Tr. 817-19).

In rebuttal the government called Drs. Mauris Platkin

and George Weickhardt. Dr. Platkin had presided at the staff conference in June, 1968, on defendant's case in response to an order of commitment for examination by the U. S. District Court. The other staff members in attendance were Drs. Hamman and Stammeyer. Dr. Platkin's opinion was that defendant was not suffering from a mental disease. The other two participants disagreed. Thereafter, Dr. Platkin asked Dr. Weickhardt for an opinion. Dr. Weickhardt examined defendant and concurred in Dr. Platkin's opinion. (Tr. 840-45, 849, 866-72, 877, 886, 888, 1003-A-04, 688).

Dr. Weickhardt testified that defendant was not mentally ill (Tr. 860). His testimony did agree with Dr. Legault's to the extent of finding lapse of memory (Tr. 851); that passive aggressive personality and emotionally unstable personality are mental diseases (Tr. 892); that defendant saw Vivian as responsible for his estrangement from Poppy (Tr. 967); that burning Poppy's clothes, kicking her in the privates, and stabbing her 32 times were mentally unhealthy (Tr. 979-81, 991); that defendant was out of control when he slashed his wife 120 times (Tr. 981); that defendant was an impulsive person (Tr. 961); and that his use of the knife in the bedroom might have been the result of impulse (Tr. 982, 989-90).

Dr. Weickhardt's position, however, was that defendant's conduct in saying I'll burn your apartment in 15 minutes lacked impulsivity and that it was defendant who dictated how

much self-control he was going to use on any given occasion (Tr. 952, 963, 997). Dr. Weickhardt agreed that if it were the pattern of defendant's life to act impulsively without thinking of the consequences, that is, to be out of control, this could amount to mental illness. (Tr. 917, 920, 936-38). What's more, he admitted that his diagnosis had been made without benefit of the staff conference or the results of Dr. Stammeyer's psychological testing and without a full history of defendant's prior violent acts. (Tr. 850, 855-56, 895-900, 908-09).

Dr. Platkin's testimony also confirmed key factors in Dr. Legault's testimony. Dr. Platkin testified that defendant's slaying was not a mentally healthy act (Tr. 1055) and that he suffered from an amnesic period (Tr. 1007). Dr. Platkin testified that on Tuesday morning defendant "probably had a limited amount of control" (Tr. 1045) and that defendant's acts could have been impulsive from the first stab wound. (Tr. 1052-53). Nevertheless, Dr. Platkin based his conclusion that defendant was not suffering from a mental disease on the reports of ward attendants at St. E's that defendant was even-keeled during his commitment. Evidence of emotional variations or outbursts or anger was what was missing for a diagnosis of mental illness. (Tr. 1041; cf. 851-55). Dr. Platkin, as did the government's other expert

witness, Dr. Weickhardt, admitted limited familiarity with defendant's record of earlier violent acts. (Tr. 1022, 1036-38).

In the course of the psychiatric testimony it was developed that after the initial report from St. E's to the court, defendant's pre-trial counsel obtained an order remanding defendant to St. E's for an additional 60 days.[3/] During this period defendant's pre-trial counsel, Vincent R. Alto, had defendant examined by Dr. Legault for the purpose of determining whether defendant should be examined under truth serum to aid his recollection. (Tr. 251, 324, 339, 345, 432, 466-67, 795, 799, 879-80). Dr. Legault examined defendant at St. E's on August 12, 1968, and dictated his notes the following day.

In the course of cross-examination, the prosecutor demanded any notes or reports Dr. Legault may have prepared as a result of his examination of defendant. In compliance with a direction by the court to do so, Dr. Legault turned over to the prosecutor a copy of his August 13 notes and his letter of August 16 to defendant's counsel. (Tr. 327-29, 339, 384, 428-430, 465).

3/ The ground of the order was that defendant was "unable to recall the events that transpired at the time of the alleged homicide." (Order by Judge Corcoran, filed July 17, 1968).

The prosecutor then quoted to Dr. Legault, in the presence of the jury, over objection of the defense (Tr. 427), for the purpose of refreshing the doctor's recollection (Tr. 393-94, 421-25, 427, 431, 464-65), the following portion of the witness's August 13 notes:

> I will advise Mr. Alto that it will be inadvisable to subject this individual to pentothal hypnosis since it will give us no information we don't already have. It is also very likely that what would come out would be he had in fact gone to Poppy's sister's house with the intention of forcing Poppy to talk to him or else he would kill her. I believe this is in fact what was probably going on in his mind. (Tr. 431-33).4/

Dr. Legault stated that the quoted portion of his notes did not refresh his recollection. (Tr. 464-65). Dr. Legault

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4/ The paragraph apparently read in toto as follows:

"I will advise Mr. Alto that it will be inadvisable to subject this individual to pentothal hypnosis since it will give us no information we don't already have. It is also very likely that what would come out would be he had in fact gone to Poppy's sister's house with the intention of forcing Poppy to talk to him or else he would kill her. I believe this is in fact what was probably going on in his mind. To most of the laymen on a jury, this would be sufficient to clinch a conviction of first-degree murder. It would be most difficult to convey to them the truth of the matter in a way they could understand, namely, that an intention conceived purely under the pressure of an uncontrollable emotion is in fact no different from impulse which has not been subjected to any rational control. Even though the action is carried out over a relatively long period of time, i.e., it is not truly premeditated as the word is understood. Proper explanation would involve going into the nature of defensive operations of the ego-structural formulation and what is the nature of an effective control in general." (Tr. 394-95, 398-99, 431-35, 518).

attempted to explain that his elliptical notes did not reflect the fact that sodium pentothal would give access to defendant's aggressive feelings on the subconscious level, of which defendant was not conscious on Tuesday morning (Tr. 465-69, 528-33, 536). Dr. Legault explained that his notes were in no way inconsistent with his testimony, since the defendant did not intend to kill Poppy, using intend in the ordinary sense of the word (Tr. 466, 469; cf. 794).

Dr. Legault's notes were featured prominently in the prosecutor's closing statement. In fact the portion relied on by the prosecutor was again quoted to the jury. The prosecutor told the jury:

> "* * * Doesn't it paint a picture of a petulant person who wants his own way, ladies and gentlemen, and if he doesn't get it, he will take it. I know I said that twice. But these are things that you should think about when you go into the jury room. Now, what else did Dr. Legault tell us? He told us that he had taken and made some notes of his interview. He interviewed Jerry Carr on August 12, 1968, and made some notes of the interview and I asked and got the notes. And he says in the notes, ladies and gentlemen, this is in evidence, and I will quote it to you as it appeared in evidence:
>
> > 'I would advise Mr. Alto that it would be inadvisable to subject this individual to pentothal hypnosis since it will give us no information we do not already have. It is very likely that what would come out would be that he had in fact gone to Poppy's sister's house with the intention of forcing Poppy

to talk to him or else he would kill her.'

"And then he goes to say in a further sentence after that -- these were his words, Dr. Legault's own words, 'I believe this is in fact what was probably going on in his mind.'

"Now think about this, ladies and gentlemen, for a moment, if you will. What does this tell us about? These are notes about what he is going to tell defense counsel. And a pentothal hypnosis is a test which would be equally accessible to all the doctors, Dr. Plackett [Platkin], Dr. Weickhardt, Dr. Hamman, Dr. Sammide [Stammeyer], and Dr. Legault himself. Dr. Legault is telling us here that if this man was subjected to this test he would, it would be of high possibility at least, that he would stay [say] under the influence of the test that which would bring out, supposedly or else there's no validity to the test, his true thoughts at the time of this occurrence, that he would say under the influence of the sodium pentothal that he intended to go to that house and talk to Poppy or else he would kill her. And now he says that he would tell the lawyer that you better not bring that out and he says I believe this is in fact what was probably going on in his mind. He tells you, ladies and gentlemen, according to these notes, that his conclusion, his medical conclusion is what was going on in his mind, but it would be better not to have the sodium pentothal test because the results of that test would be taken down on written forms and sheets such as this, and Doctor Plackett and Doctor Weickhardt would also have this in front of them and it would become a record later on. So no matter how you look at it, ladies and gentlemen, you look at it from one side and you look at it from the other side. What is the significance? What significance does this have? It has great significance that Dr. Legault gave the interpretation of what he felt Jerry Carr's intention was when he was going over to that house." (Tr. 1098-1100; emphasis supplied).

The prosecutor reverted to the Legault notes in the rebuttal portion of his summation. (Tr. 1141-42).

Judge Sirica gave only a generalized charge on impeachment[5/] but did not advert to the limited effect of the material quoted for the purpose of refreshment of a witness's recollection. He refused defendant's request for an instruction on manslaughter (Tr. 1158, 1163, 1171). He gave the Lyles instruction (Tr. 1203; cf. 1111-14).

After retiring, the jury sent out the following note:

"February 27, 1969

"The jury wishes to know what penalty attaches to a Second Degree murder verdict.

"William E. Blake, foreman."

The jury returned a verdict of guilty of first degree murder, punishment life imprisonment, on the first count, and verdicts of guilty of the counts of assaulting Poppy's mother and Vivian with a knife (Tr. 1227-28).

5/ "Now, the testimony of a witness may be discredited or impeached by showing that he has previously made statements which may be inconsistent with his own testimony.

"A prior statement is admitted into evidence solely for your consideration in evaluating the credibility of a witness.

"Now, you may consider the prior statement only in connection with your evaluation of the credence to be given to the witness' present testimony in court. You must not, of course, consider the prior statement as establishing the truth of any fact contained in that statement." (Tr. 1180).

ARGUMENT

I. THE COURT ERRED IN ALLOWING THE PROSECUTOR TO READ TO THE JURY DEFENDANT'S EXPERT'S RECOMMENDATION AS TO TRIAL STRATEGY.

[With respect to this argument, appellant respectfully invites the Court's attention to the following pages of the reporter's transcript: Tr. 235-36, 265-69, 289-90, 327-28, 339, 345, 376, 384, 394-95, 398-99, 403, 417-21, 426-35, 465-69, 478, 516, 518, 529-36, 880, 1098-1100, 1116-17, 1141-42.]

A. Disclosure to Jury of the Recommendation Was Highly Prejudicial.

The defense was materially prejudiced by the exposure to the jury of its principal psychiatric witness's strategic recommendation. The Government's proof on the matter of premeditation was at best ambiguous, consisting of little more than the fact that the defendant had with him on March 5 a knife and that he cut the telephone wires at decedent's mother's house with it (Tr. 1080-83). The theory of defendant's case had already been exposed to the jury in terms of defendant's emotional dependence on the decedent and his emotional inability to be separated from her without explanation. The defense essentially built its case on the proposition that the defendant had gone to the apartment where the decedent was solely with the intent of talking with her. (Tr. 235-36).

Indeed, Dr. Legault had made this fact plain in his direct testimony. The Doctor was examined and cross-examined in great detail as to defendant's thought processes on March 5 and during the preceding weekend.

The case of the defense on insanity was unmistakably injured by the exposure of a private memorandum wherein the defense's principal expert advised trial counsel against administration of truth serum to defendant because what would likely come out under truth serum was that the defendant had gone to the decedent's sister's apartment "with the intention of forcing Poppy to talk to him or else he would kill her." The damaging impact of this statement was further intensified by the doctor's further notation that "I believe this is in fact what was probably going on in his mind."

Neither of these statements was based on actual administration of sodium pentothal to the defendant. These statements in Dr. Legault's notes were speculations as to what such a test might reveal or confirm if it were to be performed. By placing these statements before the jury the prosecution was attempting to convict the defendant on the basis of an elliptical notation (Tr. 465-66, 469) merely speculating as to the outcome of a test never performed (Tr. 534). The statement that "I believe this is in fact what was probably going on in his mind" again refers to his subconscious mind as reached through sodium pentothal (Tr. 516, 529-36).

The damaging effect of the notes was recognized at the time (Tr. 435) and their critical nature was confirmed by the fact that both counsel adverted to it in their closing statements. Government counsel elaborated on the statement at some length -- even going so far as to quote it -- in his summation (Tr. 1098-1100). He again adverted to it in his closing rebuttal (Tr. 1141-42). It is too much to expect a jury to give fair consideration to the contention that the defendant acted impulsively or compulsively in an unthinking, animalistic rage, when it is supposed by his own psychiatrist that he had in mind killing the decedent. No cautionary instruction could have possibly removed the prejudice of this damaging statement and, in fact, no such admonition to the jury was made by the trial judge.

B. Strategic Recommendations of Experts Should be Treated as Privileged.

In preparing his defense, defendant and his counsel were dependent on the knowledge and judgment of their psychiatric expert. It is plain in this case that Dr. Legault's role went far beyond that of merely testifying as to his observations. He counseled the defendant's trial attorney on at least what observations should even be made by him as an expert. Dr. Legault's assistance to the defense appears from the record to have been precisely the type of expert assistance contemplated by this court in order that the issue of defendant's

sanity can be fully and completely exposed at trial. To hamper or constrain this sort of consultation between counsel and expert would be inimical to adequate presentation of the insanity defense.

Therein lies the heart of defendant's claim here that the strategic recommendations from his psychiatric expert to his counsel should be privileged from later disclosure before the jury. Into whatever pigeon-hole one places this privilege, it firmly rests on the necessity of adequate pre-trial preparation on a complex and technical issue.

1. Consultation Between Counsel and Psychiatric Experts is Encompassed by the Defendant's Right to Counsel.

Where defendant must prepare and make his defense in a highly technical area, his right to counsel under the Sixth Amendment encompasses the right of his legal counsel to consult fully and freely with his psychiatric counsel, unhampered by the fear of disclosure at trial of the substance of their consultation. The possibility of such disclosure would inhibit free exploratory discussion of various strengths and weaknesses of the case and of possible theories of defense.

What is at stake here is not the disclosure of adverse objective facts. What is at issue is a disclosure of the mental processes of counsel and expert at a stage where a

decision is being made as to what further investigations might or should be made. If consultations such as these were to be subject to exposure, then defense counsel is inhibited from even asking his expert to evaluate the possible gains and losses from a given course of action for fear that the expert's pre-investigation recommendations may be even more adverse than the objective facts which he is asked to consider investigating.

No one would urge that it could be admitted against a defendant that his counsel had decided not to investigate further certain possible leads, and no one would seek to probe the mental processes of an attorney in arriving at such a decision. In a field where the lawyer cannot reasonably be expected to form his own medical judgment, he must of necessity rely on the judgment of a psychiatrist in order to reach decisions on legal strategy.

To deprive defendant of an opportunity for his counsel to consult an expert without prejudice is to force defendant's counsel to make a judgment based on inadequate training. This deprivation would deprive defendant of an essential benefit of legal counsel at a critical stage in the proceeding when it is "necessary to assure a meaningful 'defense'." Cf. United States v. Wade, 388 U.S. 218, 225 (1967). If it is plain that the defendant is entitled to adequate counsel at a preliminary hearing or a line-up, then surely it is equally plain that he is entitled to adequate counsel in preparation

for trial. Adequate counsel encompasses such expert assistance.

The obvious truth of this proposition is confirmed, moreover, by the legislative history of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1969 Supp.), which provides for compensation for the hiring of experts for the defense. In testimony before the Senate Committee on the Judiciary in 1963, Attorney General Kennedy said this:

> "Providing for experienced, paid counsel is fundamental. But the phrase "adequate defense' means more than counsel. . . .
>
> * * * *
>
> "I think we have found, from the study [6]/ we have made, and I think it is quite clear, that providing an adequate defense for an individual does not rest just with having a lawyer, that he might have to have an investigation made. He might have to go out and find other witnesses. He might have to hire doctors, all of these other kinds of services which should be made available." [Hearings at 10, 24-25].

The Attorney General specifically recognized the purpose of making available "expert and other services frequently essential to ascertaining the facts and <u>making the judgments</u>

6/ Presumably the reference is to "Poverty and the Administration of Federal Criminal Justice," Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice, February 25, 1963, wherein it was recognized that defense reliance on court-appointed psychiatrists or psychiatrists practicing in government hospitals does not solve the problem of supplying the accused with meaningful access to expert testimony. Quoted in Hearings on S. 63 and S. 1057 before the Senate Committee on the Judiciary (88th Cong., 1st Sess.) 183 at 198-99 (1963).

upon which to prepare and present the defendant's case." 7/

Testifying before the Senate Committee, Professor Francis Allen of the University of Michigan, Chairman of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, stated:

> ". . . S. 1057 recognizes that adequate defense requires provision of services in addition to those of counsel. One of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense. In many cases, the lawyer, however competent, cannot supply adequate representation without pretrial investigation of his case to locate and interview witnesses, secure relevant evidence, and inform himself of as to matters essential to proper cross-examination. In some cases a full and proper defense will require access to experts, such as psychiatrists, accountants, or other specialists. Under present practices no provision--or at best, inadequate provision--for such services is made. As was remarked by the Attorney General's Committee:
>
> > Until present practices are rectified and such services are made available, the procedures in the Federal courts cannot fairly be characterized as a system of adequate representation.
>
> "These matters were given full and thoughtful consideration in the drafting of S.1057. Subsection (a) expressly includes investigative services and access to experts as integral parts of the concept of adequate defense." [Hearings at 146.]

7/ Letter to the President from the Attorney General, March 6, 1963, printed in H. Rep. 648 on H.R. 7457 (88th Cong., 1st Sess.) at 5 (1963) (emphasis supplied).

The essentiality of aid from the defense's own psychiatrist in the presentation of an insanity defense was recognized by Mr. Justice Brennan in an address before the National Association of Defense Lawyers in Criminal Cases. Expert legal help, he told them, "is only half a loaf."[8] He then went on to quote from Judge Bazelon's opinion in the Williams case the observation that "the preparation of the psychiatric evidence which is required to prove an individual's mental condition at some past date is a very difficult task." Williams v. United States, 120 U.S. App. D.C. 51, 55, 250 F.2d 19, 23 (1957). Defense counsel to do an adequate job, he concluded, must have access to their own psychiatric experts.[9]

2. Such Privilege is Analogous to the Attorney-Client Privilege and the Work Product Privilege.

A privilege for the communications and work product of experts has been recognized in civil litigation, where the issues at stake are far less prized than a defendant's constitutional right to a fair trial. Some of the same considerations that militate against disclosure of communications between attorney and client and the work product of the

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8/ Brennan, "Law and Psychiatry Must Join in Defending Mentally Ill Criminals," 49 J.A.B.A. 239, 242 (1963).

9/ See also Goldenstein and Fine, "The Indigent Accused, the Psychiatrist, and the Insanity Defense," 110 U. Pa. L. Rev. 1061, 1066 (1962).

attorney are plainly applicable here.

The attorney-client privilege, of course, arises from the necessity of free disclosure of facts by the client to his attorney, free of the fear that such statements could be proved as admissions of a party. And it is accepted that communications through an agent to the attorney are privileged for the same reason. It is not too much of an extension of this rationale to place within the privilege the strategic recommendations of an expert witness prior to trial, where the witness is "sponsored" by the defendant and is viewed by the jury as an agent of kinds for the party.

Similar considerations are present with respect to the qualified privilege accorded attorneys' "work product" in civil litigation. Although declining to extend the attorney-client privilege to encompass all matters obtained by an attorney in preparation for trial, the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), refused to permit discovery of such matters as of right. In holding that a showing of necessity or justification must be made to obtain discovery of such matters, the court grounded its decision upon the public policy underlying the orderly prosecution and defense of legal claims, stating:

> Proper preparation of a client's case demands that he [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the

> framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible ways aptly though roughly termed by the Circuit Court of Appeals in this case, as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. [Id. at 511.]

The civil cases on the pre-trial discoverability of experts have gone both ways, although those denying discovery are legion.[10/] A further consideration here is that the expert, insofar as strategic recommendations are involved at least, stands in the same position as a co-counsel. As such his recommendations fall within the usual privilege accorded communications of counsel. See, Cold Metal Process Co. v. Alcoa, 7 F.R.D. 684, 686-87 (D. Mass. 1947).

As Professor Friedenthal has recognized, "if the expert's reports to the attorney are not privileged, clients will be less likely to hire the specialists and the latter will

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10/ See, e.g., United Air Lines v. United States, 26 F.R.D. 213, 218 (D. Dela. 1960); United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Calif. 1959); White Pine Cooper Co. v. Continental Ins. Co., 166 F.Supp. 148, 162-63 (W.D. Mich. 1958); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D.N.J. 1954).

be less likely to make full disclosure; rather they would tend to communicate only those facts and opinions that would be favorable to their client's case.[11]

If the privilege is to be extended to the attorney's stenographer on the grounds of necessity,[12] then it is unreasonable not to apply it equally to the expert's strategic recommendations, where the necessity is just as urgent.

Rule 16 (c) of the Federal Rules of Criminal Procedure specifically excepts from discovery by the prosecution "reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys" other than scientific or medical reports.[13] While a distinction has been drawn between

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11/ Friedenthal, "Discovery and Use of an Adverse Party's Expert Information," 14 Stanford L. Rev. 455, 460 (1962).

12/ See VIII Wigmore on Evidence § 2301 (McNaughton rev. 1961).

13/ The quoted language was added after the 1964 draft circulated by the Committee on Rules of Practice and Procedure of the Judicial Conference. Compare 34 F.R.D. 422 (1964) with 39 F.R.D. 174 (1966).
See also Rule 5-03(b)(2), Rules of Evidence for the United States District Courts and Magistrates (Preliminary Draft, March, 1969).

experts and expert witnesses,[14] the indigent defendant is not allowed the luxury of non-testifying psychiatric expert -- he is lucky to have an expert at all. Certainly here, where the context of the statement is so plainly advisory rather than substantive, the privilege should obtain.

C. Privilege Was Not Waived.

The absence of objection to the turning over of Dr. Legault's notes to the prosecutor did not constitute waiver of defendant's claim to privilege as to the use of Dr. Legault's trial recommendations before the jury. Objection to disclosure of the notes to opposing counsel was voiced by Dr. Legault himself and overruled (Tr. 327). In Taylor v. United States, 95 U.S. App. D.C. 373, 222 F.2d 398 (1955), the question of privilege was raised by the psychiatrist, and the majority held inter alia that the claim of physician-patient privilege was adequately invoked by the physician-witness.

Moreover, ample objection was made by defendant's counsel to the actual disclosure of this portion of the doctor's notes to the jury at the critical point in the trial. (Tr. 427).

D. Even if the Recommendations Were Not Privileged, The Judge Abused His Discretion in Not Limiting Their Use.

Assuming arguendo that the portion of the doctor's

14/ See Lalance & Crosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563, 565 (S.D.N.Y. 1898).

notes in question was not privileged and was otherwise admissible, the Judge should have barred its use because of the great prejudice accruing to defendant through exposure to the jury. The concept of otherwise admissible evidence which is excluded because of its prejudicial effect is not a concept foreign to criminal trial practice. Cf. Shepard v. United States, 290 U.S. 96, 104 (1933); Cannady v. United States, 122 U.S. App. D.C. 99, 101, 351 F.2d 796, 798 (1965); Model Code of Evidence, Rule 303(1)(b) (A.L.I. 1942); Rule 4-03(a), Rules of Evidence for the United States District Courts and Magistrates (Preliminary Draft, March, 1969).

Similarly, this court has held that the use of prior convictions of a defendant to impeach his credibility must be carefully limited to avoid undue prejudice to the accused by inhibiting his taking of the stand. See, e.g., Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967) cert. den., 390 U.S. 1029 (1968); Brown v. United States, 124 U.S. App. D.C. 220, 370 F.2d 242 (1966). Indeed, evidence of a prior inconsistent statement otherwise admissible to impeach credibility must be excluded where the content of the statement is highly prejudicial. See, Cannady v. United States, supra.

II. READING OF THE EXPERT'S NOTES TO THE JURY WAS IMPROPER REFRESHMENT OF RECOLLECTION.

[With respect to this argument, appellant respectfully invites the Court's attention to the following pages of the reporter's transcript: Tr. 384, 393-95, 398-99, 421-35, 464-69, 518, 528-33, 536, 794.]

The prosecutor purported to read to the jury Dr. Legault's notes for the purpose of refreshing the doctor's recollection. No adequate foundation for refreshing the doctor's recollection was laid, and the prosecutor used an improper and prejudicial technique of refreshment.

A. There Was No Failure of Memory.

Although this may be occasionally lost sight of, the essential and only purpose of refreshing a witness's recollection is that of refreshment of his recollection. Here there was no showing of the need for refreshment. At no time did the witness say or indicate that he could not recall any of the facts as to which the prosecutor purported to refresh his recollection.

Since there was no failure of memory, the prosecutor was not entitled to proceed to refresh the witness's memory in this fashion. This is the generally accepted rule, which has long prevailed in this and other jurisdictions. See, e.g., Rudd v. Buxton, 41 App. D.C. 353, 358 (1914); Gunning v. Cooley, 58 App. D.C. 304, 306, 30 F.2d 467, 469 (1929),

aff'd 281 U.S. 90 (1930); N.L.R.B. v. Federal Dairy Co., Inc., 297 F.2d 487, 488-89 (1st Cir. 1962); Goings v. United States, 377 F.2d 753 (8th Cir. 1967); Thompson v. United States, 342 F.2d 137, 139 (5th Cir. 1965), cert. den., 381 U.S. 926 (1965); Minneapolis v. Price, 280 Minn. 429, 159 N.W.2d 776 (1968).

B. Reading the Notes Aloud Rather Than Handing Them to the Witness Was Improper.

The fictional basis of the prosecutor's claim to the right to proceed by way of refreshment of recollection was amply demonstrated by the fact that he not only handed the witness a copy of his notes (Tr. 384), but also proceeded to read within the hearing of the jury the notes to the Doctor which the Doctor could read for himself. (Tr. 428)[15/]

Reading the notes aloud was clearly improper under the circumstances of this case.

In the case of Young v. United States, 94 U.S. App. D.C. 62, 214 F.2d 232 (1954), this court reversed a perjury conviction where the prosecutor read the witness's testimony before the grand jury to him and to the jury for the purposes of refreshing his recollection. In the Young case, an attempt was first made to have the witness refresh his recollection by silently reading a part of his grand jury testimony. This

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15/ In fact, later upon resumption of the prosecutor's cross-examination, the trial judge directed the prosecutor not to read the notes since the witness had them in front of him. (Tr. 464).

much the court found proper. But when the witness adhered to his testimony, the prosecutor was permitted to read aloud much more of his grand jury testimony. Of this the court said "this was not refreshing the witness's recollection. It was placing before the trial jury testimony previously given before a grand jury . . ." While cross-examination to refresh a witness's recollection by prior statements may be permitted, the court said, the contents of the statement are not to be put in evidence before the jury. In support of its reversal on this point, the Court cited the Supreme Court's opinion in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940), where the Supreme Court observed that "there would be error where under the pretext of refreshing a witness's recollection, the prior testimony was introduced as evidence", citing Rosenthal v. United States, 248 Fed. 684, 686 (8th Cir. 1918).

Subsequently, in Gaines v. United States, 121 U.S. App. D.C. 213, 349 F.2d 190 (1955), the court again found error in this practice. There the court said:

> "The prosecution, claiming surprise, examined two of its own witnesses on the basis of prior statements which gave a version of the events more unfavorable to defendant than their trial testimony. The court permitted their prior statements to be read to the witnesses in the hearing of the jury. The court's theory was that the statements could be used to refresh the witnesses' recollection. The court carefully instructed the jury that the statements were not evidence of the truth of their contents.

> "It was error to permit the jury to hear these statements. To refresh the witnesses' recollection it was not necessary for counsel to read the statements aloud in the jury's presence. This is liable to cause the jury to consider their contents as evidence notwithstanding instructions to the contrary. See Young v. United States, 94 U.S. App. D.C. 62, 214 F.2d 232. Cf. Robinson v. United States, 113 U.S. App. D.C. 372, 376, 308 F.2d 327, 331, cert. denied, 374 U.S. 836...." [121 U.S. App. D.C. at 215, 349 F.2d at 192.]

Other courts have similarly held it error to permit the government to read aloud in the hearing of the jury the testimony of a witness at a prior trial for the avowed purpose of refreshment, the proper means being to hand him the transcript and to permit him to read his prior testimony silently. See, York v. United States, 389 F.2d 761 (9th Cir. 1968); and cf. United States v. McKeever, 271 F.2d 669, 675 (2d Cir. 1959); Goings v. United States, 377 F.2d 753, 761 (8th Cir. 1967).

III. THE PROSECUTOR'S REFERENCE IN SUMMATION TO THE DOCTOR'S NOTES AS BEING IN EVIDENCE WAS SO PREJUDICIAL AS TO REQUIRE REVERSAL.

> [With respect to this argument, appellant respectfully invites the Court's attention to the following pages of the reporter's transcript: Tr. 1098-1100, 1116-17, 1141-42, 1180.]

The prejudice to the insanity defense of the reading of the notes to the jury was multiplied by the prosecutor's use of Dr. Legault's notes in his summation, where he twice

referred to them as being "in evidence".[16] This was plain error.

The notes, used only for the purpose of refreshment of recollection, were not in evidence. Cf. Young v. United States, 94 U.S. App. D.C. 62, 68, 214 F.2d 232, 238 (1954); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940); Westinghouse Elec. Corp. v. Wray Equip. Corp., 286 F.2d 491, 493 (1st Cir. 1961), cert. den., 366 U.S. 929 (1961). And see also, Bartley v. United States, 115 U.S. App. D.C. 316, 318-19, 319 F.2d 717, 719-20 (1963).

As this Court recently observed, "It is elementary, however, that counsel may not premise arguments on evidence which has not been admitted", citing Robinson v. United States, 32 F.2d 505, 66 A.L.R. 468 (8th Cir. 1928), and Latham v. United States, 226 Fed. 420, 1916D L.R.A. 1118 (5th Cir. 1915). Johnson v. United States, 121 U.S. App. D.C. 19, 21, 347 F.2d 803, 805 (1965). In Johnson the Court held it error for the prosecutor to refer to Jencks Act statements

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16/ "He [Dr. Legault] interviewed Jerry Carr on August 12, 1968, and made some notes of the interview and I asked and got the notes. And he says in the notes, ladies and gentlemen, this is in evidence, and I will quote it to you as it appeared in evidence:...." (Tr. 1098; emphasis supplied). The prosecutor reverted to the subject of Dr. Legault's notes in the rebuttal portion of his summation (Tr. 1141-42).

Here, as in Eisenberg v. United States, 273 F.2d 127, 133 (5th Cir. 1959), the comment that the statement "is in evidence" and the omission of any qualifying instruction by the judge was tantamount to inviting the jury to treat the statement as substantive evidence.

as corroborating the testimony of the police witness, since the contents of the statements were not in evidence. See also, United States v. Guajardo-Melendez, 401 F.2d 35, 40 (7th Cir. 1968); Eisenberg v. United States, 273 F.2d 127 (5th Cir. 1959).

In Garris v. United States, 129 U.S. App. D.C. 96, 390 F.2d 862 (1968), where the government's witness was not permitted to testify that she had not identified two other suspects, this Court held it plain error for the prosecutor to argue facts to the jury which he had been unable to get into evidence. Notwithstanding the absence of objection and the strong case for the prosecution, this Court reversed.

Similarly, where the prosecutor referred to the contents of Jencks Act statements not in evidence, this Court reversed. Reichert v. United States, 123 U.S. App. D.C. 294, 359 F.2d 278 (1966).

In King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967), this Court specifically found error in the prosecutor's repeated assertions without evidentiary foundation that no organic mental defect had been found. The appellant's conviction was reversed notwithstanding the corrective and clarifying measures undertaken by defense counsel and the witnesses. These measures, the Court said, could hardly catch up to, let alone overtake, the misstatements. The court's customary caution not to rely on statements of

counsel was deemed not curative.

The Stewart case is instructive on several aspects of this issue. There the prosecutor made unsupported statements that witnesses for the defense had perjured themselves. Although defense counsel complained of the error neither at trial nor on appeal and the judge gave the customary instruction on argument of counsel, this Court noted the error and reversed. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42 (1957)(in banc). Indeed, the trial judge has an affirmative duty on his own initiative to interrupt, admonish the offender, and instruct the jury to disregard the improper argument. Cf. United States v. Sawyer, 347 F.2d 372, 374 (4th Cir. 1965); Steele v. United States, 222 F.2d 628, 631 (5th Cir. 1955), cert.den., 355 U.S. 828 (1957). And see, Ginsburg v. United States, 257 F.2d 950, 954-55, 70 A.L.R.2d 548, 554-55 (5th Cir. 1958).

The prejudice to defendant by reason of the prosecutor's remarks was intensified by the absence of an instruction from the trial judge limiting the jury's consideration of the notes.[17/] Here the judge not only permitted the doctor's

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17/ The general rule is that such prior statements can be considered by the jury at most only on the credibility of the witness' testimony after refreshment. Cf. United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), cert. den., 329 U.S. 806 (1947). Here the doctor testified that his recollection was not refreshed (Tr. 464, 465).

notes to be read aloud, but did not limit the purpose for which they might be considered. Cf. Edmonds v. United States, 104 U.S. App. D.C. 144, 149, 260 F.2d 474, 479 (1958)(in banc) cert. den., 362 U.S. 977 (1960); Cannady v. United States, 122 U.S. App. D.C. 99, 101, 351 F.2d 796, 798 (1965). Thus, the prosecutor's unqualified reference to the notes as being "in evidence" stood uncorrected in the minds of the jurors. This was plain error. See, King v. United States, supra.

IV. THE GIVING OF THE LYLES CHARGE PREJUDICED DEFENDANT'S INSANITY DEFENSE.

[With respect to this argument, appellant respectfully invites the Court's attention to the following pages of the reporter's transcript: Tr. 229, 845, 860, 880, 1009, 1017, 1111-14, 1203.]

In light of the testimony in this case, the trial court's giving to the jury the Lyles instruction resulted in serious prejudice to the defendant's insanity defense. The judge told the jury that if the defendant were found not guilty by reason of insanity, he would be committed to St. Elizabeth's Hospital "until it is established that he is no longer dangerous due to mental illness, at which time he will be released and he will suffer no further consequences for this offense or these offenses." (Tr. 1203).

Since the jury had already been told that St. Elizabeth's had certified defendant as competent (Tr. 845, 880) and since the two chief psychiatrists at the hospital (Tr. 1017)

had testified for the government that defendant was not insane (Tr. 860, 1009), the instruction as worded was tantamount to telling the jury that if defendant were acquitted by reason of insanity he would go through St. E's in a revolving door -- in and back out again. A verdict of not guilty by reason of insanity, the jurors could have supposed, would result in the perpetrator of an admittedly "horrendous" crime, "a crime that staggers the imagination" (Tr. 229), being shortly turned loose by the staff of St. Elizabeth's. Such a misconception is not improbable in light of the general unfamiliarity of jurors with the complex procedures applicable to insanity in the District, which unfamiliarity provides the underlying rationale for the Lyles instruction itself.

Nowhere was the jury told that defendant would be released only after a further court hearing, a point specifically raised at the bench by defense counsel. (Tr. 1113).

That the jury instruction on the effect of an acquittal by reason of insanity is a critical one and one of considerable difficulty is attested to by the long line of cases dating at least from Taylor v. United States, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (1955), where the Court stated: "Though this fact has no theoretical bearing on the jury's verdict, it may have a practical bearing." Thereafter, in Durham v. United States, 99 U.S. App. D.C. 132, 237 F.2d 760 (1956), this Court held erroneous an instruction that the

defendant would be committed to St. Elizabeth's until determined to be "of sound mind" by the hospital authorities.

In the Lyles case itself, Lyles v. United States, 103 U.S. App. D.C. 22, 254 F.2d 725 (1957)(in banc), cert. den., 356 U.S. 961 (1958), a majority of the court pointed out that "a verdict of not guilty by reason of insanity has no ... commonly understood meaning" and that consequently the jury should be instructed on the meaning of such a verdict. Id. at 25, 254 F.2d at 728. While not prescribing the exact form of such an instruction, the opinion said:

> "We think that when the instruction is given the jury should simply be informed that a verdict of not guilty by reason of insanity means that the accused will be confined in a hospital for the mentally ill until the superintendent has certified, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or to others, in which event and at which time the court shall order his release either unconditionally or under such conditions as the court may see fit." [Ibid.]

Although a majority of the Court declined to reverse in Lyles, the Court later reversed on this point in Catlin v. United States, 102 U.S. App. D.C. 127, 251 F.2d 368 (1957).

Subsequently, the Court sitting in banc reversed a conviction for failure to give the Lyles instruction where the record did not affirmatively show that the defendant did not want it. McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962).

Defendant submits that he did not receive an opportunity for fair and unprejudiced consideration by the jury of his insanity defense because of the "revolving door" consideration which underlies Taylor and the succeeding cases discussed above. This consideration is particularly acute in a case such as this where the jury is made fully aware of the fact that the consistent position of St. Elizabeth's -- as reflected in the testimony of its top staff members -- has been and is that defendant is competent and suffers from no mental disease.

It is defendant's position that a fair and unprejudiced jury consideration of the verdict of not guilty by reason of insanity is impossible without an instruction on the "meaning" of such a verdict. Cf. Lyles v. United States, supra. At the same time, that explanation becomes highly prejudicial once the jury has been made aware of the position of the hospital's staff. The original sin in the instant case was disclosure to the jury through government witnesses of the hospital's position.

Defendant's trial counsel apparently was forced to rely on an instruction by the court to minimize the prejudice arising from disclosure of the hospital's position.

The instruction argued for by counsel, Instruction 124,[18] would have advised the jury that defendant would not be turned loose until "the Court is satisfied, that he has recovered his sanity and will not in the reasonable future be dangerous to himself or others." The instruction actually given by the trial court[19] referred only to an initial "hearing" and to establishment at a later time that defendant was not dangerous. The instruction was deficient in that it did not specify a judicial hearing in both cases. The jury might easily have been confused between "a hearing" and a staff conference, since the latter was discussed at great length at trial by the witnesses from St. Elizabeth's. The instruction gave no assurance that the fact of defendant's lack of dangerousness would be established other than by the hospital at which he was to remain "until it is established that he is no longer dangerous due to mental illness...."

18/ Junior Bar Section: Criminal Jury Instructions for the District of Columbia 108 (1966). The trial judge had previously advised counsel that substantially this instruction would be given (Tr. 936, 1010, 1111).

19/ The text of the trial court's instruction followed that prescribed in Bolton v. Harris, 130 U.S. App. D.C. 1, 10, n.50, 395 F.2d 642, 651 n.50 (1968).

CONCLUSION

Defendant respectfully submits that each of the four errors set forth above independently requires reversal of his conviction.

Respectfully submitted,

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Attorney for
Jerry Carr, Jr.
(Appointed by this Court)

September 3, 1969.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be delivered by hand to the office of the United States Attorney for the District of Columbia, 3820 U. S. Courthouse, Washington, D. C. 20001, this 3d day of September, 1969, a copy of the foregoing brief for the appellant.

William Malone
WILLIAM MALONE

September 3, 1969.

APPENDIX

U.S. Constitution, Amendment VI -

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

D.C. Code, 1967 Edition -

§ 22-502. Assault with intent to commit mayhem or with danerous weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 804.)

§ 22-2401. Murder in the first degree--Purposeful killing--Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339.)

Federal Rules of Criminal Procedure, Rule 16(c) -

> Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

Before the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D. C. 20001

United States Court of Appeals
for the District of Columbia Circuit
FILED NOV 16 1970
Nathan J. Paulson
CLERK

UNITED STATES OF AMERICA,
Appellee,

v.

JERRY CARR, JR.,
Appellant.

Case No. 23,004
(Cr. No. 446-68)

SUGGESTION THAT THE APPEAL
BE REHEARD IN BANC

Because this appeal presents an issue of general importance which affects the conduct of criminal trials involving the use of psychiatric testimony by the defense, which issue appellant believes was wrongly decided by the majority of the sitting panel, appellant respectfully suggests that the appeal be reheard by this Court in banc. This suggestion is made pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Local Rule 14.

SUMMARY STATEMENT

The majority of the sitting panel held that a recommendation of trial strategy by a private psychiatrist to defense counsel was subject to inspection by the prosecutor and could properly be read to the jury. In so holding, the majority disregarded what appellant submits is a legally significant distinction between a psychiatrist's report of a

psychiatric examination, which is arguably subject to discovery under Federal Rules of Criminal Procedure 16(c), and his recommendation of trial strategy to counsel, which is not.

The net effect of the panel's holding is to disadvantage the indigent defendant, since he cannot afford the luxury of a non-witness psychiatric expert.

This matter is of general importance in the administration of criminal justice, since psychiatric experts are used by defendants in a substantial number of trials each year.[1/]

Statement of Pertinent Facts

The defendant was tried and convicted by a jury under an indictment charging him with the murder of his girl friend, whom he had stabbed thirty-two times. In support of the defense of insanity, the defendant called two psychiatrists, a psychologist, and a lay witness. Dr. Oscar Legault, a private psychiatrist appointed under the Criminal Justice Act[2/], was defendant's principal expert witness.

Dr. Legault testified, inter alia, that defendant suffered from a mental disease, which could be classified as

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1/ The records of the Administrative Office of the U.S. Courts reflect appointments of 198 psychiatric experts in fiscal 1969 and 171 psychiatric experts in fiscal 1970.

2/ 18 U.S.C. § 3006A(e) (1964 ed.).

"an impulse disorder," and that at the time of the knifing the defendant was berserk and not conscious of right and wrong. The testimony of the prosecution's rebuttal witnesses agreed substantially with that of defendant's witnesses except on the question of impulsiveness.

In the course of the psychiatric testimony it developed that, after the initial report from St. Elizabeth's to the court, defendant's pre-trial counsel obtained an order remanding defendant to the hospital for an additional sixty days. During this period counsel had defendant examined by Dr. Legault for the purpose of determining whether defendant should be examined under truth serum to aid his recollection. Dr. Legault examined defendant and dictated his file notes. In accordance with Dr. Legault's recommendation, pentothol hypnosis was not undertaken.

In the course of cross-examination of Dr. Legault, the prosecutor demanded any notes or reports Dr. Legault may have prepared as a result of his examination of defendant. In compliance with a direction by the court to do so,[3/] Dr. Legault turned his notes over to the prosecutor.

The prosecutor thereafter read, over objection of the defense (Tr. 427), to the jury, ostensibly for the purpose of refreshment, from the witness's notes:

> I will advise [defense counsel] that it will be inadvisable to subject this individual

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3/ Cf. Taylor v. United States, 95 U.S. App. D.C. 373, 222 F.2d 398 (1955)

> to pentothal hypnosis since it will give us no information we don't already have. It is also very likely that what would come out would be he had in fact gone to [decedent's] sister's house with the intention of forcing [decedent] to talk to him or else he would kill her. I believe this is in fact what was probably going on in his mind. [4/]

The prosecutor did not proceed by way of refreshment of recollection but by way of impeachment by prior inconsistent statement. No contemporaneous limiting instruction was given.

Dr. Legault's notes were featured prominently in the prosecutor's summation, wherein the prosecutor twice referred to them as being "in evidence".

The Opinions by the Panel

The direct appeal was heard by a panel of this Court consisting of Chief Judge Bazelon and Circuit Judges McGowan and MacKinnon. In a per curiam opinion, the majority rejected defendant's claim of privilege on the grounds that the notes fell within statutory exceptions to the physician-patient privilege[5/] and within the reciprocity provision of Rule 16(c), Federal Rules of Criminal Procedure. The opinion rejected also the claim

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4/ The relevant portion of the notes continued: "To most of the laymen on a jury, this would be sufficient to clinch a conviction of first-degree murder. It would be most difficult to convey to them the truth of the matter in a way they could understand, namely, that an intention conceived purely under the pressure of an uncontrollable emotion is in fact no different from impulse which has not been subjected to any rational control. Even though the action is carried out over a relatively long period of time, i.e., it is not truly premeditated as the word is understood. Proper explanation would involve going into the nature of defensive operations of the ego-structural formulation and what is the nature of an effective control in general."

5/ 14 D.C. Code § 307.

of privilege founded on the attorney-client relationship on the grounds that "the interest of public justice" required disclosure and that Dr. Legault had told the hospital staff in conclusory fashion that he recommended against pentothal hypnosis.

As to the claim founded upon the attorney-client relationship, Chief Judge Bazelon disagreed:

> [W]hen a psychiatrist has recommended that a certain test not be given and his reasons turn out to be strategic rather than medical, it is not clear that we are dealing with the kind of "reports and conclusions" that need to be disclosed to ensure "complete exploration" of the mental state of accused.

The dissent also disagreed with the majority's conclusion that the notes in question had in fact been communicated by the psychiatrist himself to a representative of the Government. The dissent, however, found it unnecessary to resolve "the difficult question of privilege that appellant raises."

The dissenting judge would have reversed on the failure of the trial judge to give the mandatory contemporaneous instruction on impeachment. He further noted the impact of the prosecutor's closing argument on the jury's understanding of the limited purpose for which the notes were to be admitted, so that he found the standard instruction on impeachment at the end of trial insufficient to protect against the misuse of the notes by the jury.

Argument

I. THIS COURT SHOULD CONSIDER THE PRIVILEGE TO BE ACCORDED STRATEGIC RECOMMENDATIONS OF PSYCHIATRIC EXPERTS.

The confidentiality of a psychiatric expert's strategic recommendation is a question of great concern in the trial of

criminal -- and civil -- cases. In preparing his defense, the defendant and his counsel are dependent on the knowledge and judgment of their psychiatric expert.[6/] In the instant case it is plain that Dr. Legault's role went far beyond that of merely testifying as to his observations. He counseled the defendant's trial attorney on at least what observations should even be made by him as an expert. To hamper or constraint this sort of consultation between counsel and expert would be inimical to adequate presentation of the insanity defense, since the possibility of disclosure would inhibit free exploratory discussion of various strengths and weaknesses of the case and of possible theories of defense.

What is at stake here is not the disclosure of adverse objective facts, for the pentothal hypnosis was never performed; the jury was given mere speculation as to what the results might have been had it been performed. What is at issue is a disclosure of the mental processes of counsel and expert at a stage where a decision is being made as to what further investigations might or should be made. If consultations such as these are to be subject to exposure, then defense counsel is inhibited from even asking his expert to evaluate the possible gains and losses from a given course of action for fear that the expert's pre-investigation recommendations may be even more adverse than the objective

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6/ Expert legal help "is only half a loaf." Brennan, "Law and Psychiatry Must Join in Defending Mentally Ill Criminals," 49 J.A.B.A. 239, 242 (1963). See also Friedenthal "Discovery and Use of an Adverse Party's Expert Information," 14 Stanford L. Rev. 455, 460 (1962), and Goldstein and Fine, "The Indigent Accused, the Psychiatrist, and the Insanity Defense," 110 U. Pa. L. Rev. 1061, 1066 (1962).

facts which he is asked to consider investigating.

Such consultation is surely within the protection of the Sixth Amendment and Hickman v. Taylor, 329 U.S. 495 (1947), as well as within the clear intendment of the Criminal Justice Act of 1964 , 18 U.S.C. § 3006A (e). The Act provides for compensation for the hiring of experts with the purpose of making available "expert and other services frequently essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant's case."7/

While a distinction has sometimes been drawn between the privilege accorded reports of experts and expert witnesses, the indigent defendant is not allowed the luxury of a non-testifying expert witness. Thus, the majority's decision favors the non-indigent defendant over the indigent one. In any event, Dr. Legault's notes were not a medical report within the meaning of Rule 16(c).

II. THE PANEL'S FAILURE TO FOLLOW CLEAR PRECEDENT IN THIS CIRCUIT SHOULD BE EXAMINED AND REVERSED.

The trial court's failure to give a contemporaneous instruction limiting to impeachment the purpose for which the jury could consider Dr. Legault's notes was plain error. Such an instruction is required by Coleman v. United States, 125 U.S. App. D.C. 246, 249, 371 F.2d 343, 346 (1966), cert. den.,

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7/ Letter to the President from the Attorney General, March 6, 1963, printed in H. Rep. 648 on H.R. 7457 (88th Cong., 1st Sess.) at 5 (1963) (emphasis supplied).

386 U.S. 945 (1967). In reversing the defendant's conviction in Jones v. United States, 128 U.S. App. D.C. 36, 40, 385 F.2d 296, 300 (1967), this court held that such a contemporaneous instruction was mandatory "unless manifestly waived" and that failure to give the instruction was plain error. The trial judge in the instant case had expressly recognized his obligation to give such a contemporaneous instruction (Tr. 421-23, 425, 427), yet it was not given.

Conclusion

For the reasons urged above and in defendant's briefs in this Court, the Court should order the appeal reheard in banc and should afford defendant such further and different relief as may be just and proper.

Respectfully submitted,

William Malone

Attorney for Defendant
(Appointed by this Court)

November 16, 1970

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed this 16th day of November, 1970, a copy of the foregoing pleading to John A. Terry, Esq., Assistant United States Attorney, U. S. Courthouse, Washington, D. C. 20001

William Malone
WILLIAM MALONE

November 16, 1970

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,004

UNITED STATES OF AMERICA, Appellee

v.

JERRY CARR, JR., Appellant

On Appeal from the United States District Court for the District of Columbia

[illegible]

WILLIAM MALONE
888 Sixteenth Street, N.W.
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Attorney for Appellant
(Appointed by this Court)

November 10, 1969

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REPLY BRIEF FOR APPELLANT

ARGUMENT

I. DEFENDANT'S PSYCHIATRIST'S PRE-TRIAL RECOMMENDATION OF STRATEGY REMAINED PRIVILEGED.

[With respect to this argument, appellant respectfully invites the Court's attention to the following pages of the reporter's transcript: 327-28, 429.]

In response to the defendant's contention that the pre-trial strategic recommendation of his psychiatrist to defense counsel that sodium pentothal not be administered was privileged, the government urges that the notes containing this recommendation were not privileged and, even if privileged, the privilege was waived.

A. Express Waiver.

The government's contention at pages 8 and 11 of its brief that the privilege was expressly waived by counsel finds no support in the record. The government apparently relies on line 8 of page 328, where defense counsel says: "No, I don't have any objection."

Two separate documents were involved -- the notes and a letter. It is clear from the preceding lines of the transcript[1/] that defense counsel was responding to the prosecutor's question, "May I see that [letter to Mr. Alto], also?" This reading is confirmed by the different treatment accorded the two documents by trial counsel. The prosecutor apparently found that, having Dr. Legault's notes, there was nothing in the letter which he could use thereafter in cross-examining the witness. In contrast, vigorous objection was made by defense counsel to subsequent attempts by the prosecutor to get the strategic recommendation before the jury (e.g., Tr. 427).

B. Statutory Exceptions to Privilege Status.

The government next argues that the two exceptions to the physician-patient privilege contained in 14 D.C. Code

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1/ "A I wrote a letter to Mr. Alto [then defense counsel].
"Q Do you have a copy of that?
"A Yes.
"Q May I see that, also?
"A Again --
"THE COURT: Any objection?
"MR. TRAENOR: No, I don't have any objection.
"THE COURT: All right.
"(The witness hands to Mr. McKenna a letter.)" [Emphasis supplied.]

§ 307 apply in this case (Govt. br. 8-9). The statute reads as follows:

> § 14-307. Physicians.
>
> (a) In the courts of the District of Columbia a physician or surgeon may not be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a patient in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the patient or from his family or from the person or persons in charge of him.
>
> (b) This section does not apply to:
>
> (1) evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure is required in the interests of public justice; or
>
> (2) evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity, or in the pretrial or posttrial proceedings involving a criminal case where a question arises concerning the mental condition of an accused or convicted person.

Logically implicit in the government's argument is the extraordinary proposition that because evidence is not privileged under one rule of evidence (here, the physician-patient privilege, on which the defendant does not rely), it is necessarily unprivileged under other evidentiary rules (here, the attorney-client privilege and the work product doctrines on which defendant does rely). The statement of this proposition is a sufficient refutation.

Even assuming, arguendo, the validity of the foregoing proposition, neither of the exclusions under

Section 307 was properly invoked. Both exclusions in paragraph (b) apply only to "evidence," which is a narrower term even than "information" used in paragraph (a). Here, as was repeatedly pointed out by counsel at trial, e.g., tr. 399, the controverted material comprised speculation on results of a test never administered and a recommendation to defendant's counsel. Defendant's basic position is that such matter is not proper evidence (Deft. br. 23-28). Moreover, as to paragraph (b)(1), the trial judge did not purport to exercise his discretion under the "public justice" standard. Cf. Govt. br. 9. Indeed, the record contains no basis on which the judge's discretion could have been exercised under that standard. The trial judge did not even consider the question of the contents of Dr. Legault's notes before ordering them turned over to government counsel (Tr. 327).

The government's reliance on Rule 16(c) of the Federal Rules of Criminal Procedure is misplaced (Govt. br. 9). By its terms the rule applies only to reports, etc., "which the defendant intends to produce at the trial". Here defendant had no intention of producing Dr. Legault's notes at trial. Moreover, as pointed out in defendant's principal brief at page 26, the rule specifically excepts from discovery

> "reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case...."

It was plainly established on the record that Dr. Legault's notes were not a medical report (Tr. 327-29, 384, 428-29, 465, 469) within the meaning of the Rule 16(c) limitation on the exclusion as to medical reports.

C. Waiver of Confidentiality.

The government further argues that Dr. Legault's recommendation to counsel was not privileged because "his views were communicated to Dr. Hamman" and "incorporated by Dr. Hamman into the Saint Elizabeths clinical record.... (Tr. 879-881)." (Govt. br. 10). The record fails to support this claim. The cited pages of the transcript contain a quotation from the hospital's records of a notation by Dr. Hamman: 2/

> "This [recommitment] order came about as a result of a request by the patient's attorney that a narco-synthesis be done. ... The attorney consulted further with Doctor Oscar LeGault, who in fact, did then see the patient on August 12, 1968, in John Howard Division. It had been, and is my opinion, that narco-analysis is not indicated in this case for several reasons.. I spoke with Doctor LeGault after he had seen the patient. Doctor LeGault told me that in his opinion narco-analysis would shed little light, if any, use in this situation. Since this is the true purpose for the order and since it is the opinion of the outside consultant and the opinion of this staff member that this test is not indicated and since in the opinion of the full staff which saw the patient, he is competent for trial and a letter should be written to the Court stating, after further evaluation, the patient is still in the opinion of the staff, competent to stand trial." (Tr. 879-80).

The foregoing notation on its face indicates that only a limited amount of information was communicated to Dr. Hamman, viz., that

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2/ Dr. Hamman later testified for defendant.

in Dr. Legault's opinion narco-analysis would not be useful and was not indicated -- a far more limited statement than that made to defense counsel. Indeed, the thrust of Dr. Legault's testimony is that he did not discuss anything in the notes with other than counsel (Tr. 429).

The government also argues that any confidentiality under the physician-patient privilege was waived by the defense's calling Dr. Legault to the stand (Govt. br. 10-11 and n. 2). At the time the notes were written, it was not necessarily contemplated that the defense would call Dr. Legault to the stand. The doctor had seen the patient as a favor to prior defense counsel because he (the doctor) was interested in narco-therapy, and prior defense counsel thought narco-analysis might be a valuable line of pre-trial investigation. It was only later that a decision was made by the defense, apparently by new defense counsel, that Dr. Legault would be called and an order obtained for the payment of his fee by the United States (Tr. 344-45, 466). This much at least seems clear -- that at least the portion of the notes here relevant was made by Dr. Legault with the primary purpose of advising defense counsel on pre-trial strategy.

It would be unrealistic, in the context of the defense of an indigent defendant, to require that defense counsel obtain one private psychiatrist for non-testimonial purposes. Thus, given the defense psychiatrist's dual role, the considerations set forth in Part I of defendant's main brief in support of bringing Dr. Legault's recommendations

within the attorney-client privilege or work product doctrine are decisive.[3/] The physician-patient privilege cases, relied upon by the government, simply do not address themselves to these considerations.

II. THE PROSECUTOR DID NOT PROCEED BY WAY OF IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT.

[With respect to this argument, appellant respectfully invites the Court's attention to the following pages of the reporter's transcript: 421-28, 431-33, 1179.]

The government in its brief seeks to justify the reading aloud of Dr. Legault's notes in the presence of the jury by claiming that that was done for the purpose of impeachment by prior inconsistent statement. The record does not support this contention.

A fair reading of the record, defendant submits, is that the trial judge told the prosecutor he could proceed either by way of refreshment or by way of impeachment. The prosecutor, being doubtful as to whether or not the notes were inconsistent with Dr. Legault's testimony, attempted to hedge. The trial judge instructed the prosecutor to proceed one way or another (Tr. 421-22). The prosecutor ultimately decided to proceed only by way of refreshment (Tr. 427, 431, 433, 462-65).

3/ This duality exists both as to Dr. Legault's role and the type of information in question -- information as to physical condition as distinguished from recommendations as to trial strategy and the medical bases thereof.

The trial court also must have understood that the prosecutor had elected to proceed by way of refreshment, because the court did not give a contemporaneous instruction on impeachment, as is required by Coleman v. United States, 125 U.S. App. D.C. 246, 249, 371 F.2d 343, 346 (1966), cert. den., 386 U.S. 945 (1967). In reversing the defendant's conviction in Jones v. United States, 128 U.S. App. D.C. 36, 40, 385 F.2d 296, 300 (1967), this court held that such a contemporaneous instruction was mandatory "unless manifestly waived" and that failure to give the instruction was plain error. The trial judge in the instant case had expressly recognized his obligation to give such a contemporaneous instruction had the prosecutor elected to proceed by way of impeachment (Tr. 421-23, 425, 427).

In any event, whichever way the prosecutor ultimately proceeded, the defense's injury from exposure of the notes was magnified by the absence of the required limiting instruction. The prejudice to the defendant was further compounded by the erroneous instruction to the jurors to rely on their own experiences in determining credibility (Tr. 1179). See United States v. Jacobs, ___ U.S. App. D.C. ___, ___, 413 F.2d 1105, 1106-07 (1969).

The government quotes from the charge to the jury the general instructions on evidentiary effect of questions of counsel and materials offered for the purpose of impeachment (Govt. br. 13-14), suggesting that these instructions cured any error. It is not reasonable to expect that jurors would understand a reading aloud of Dr. Legault's notes to be a

question of counsel within the meaning of the instruction, and -- as pointed out above -- the instruction on impeachment in the charge was neither applicable to refreshment nor sufficient as to impeachment under the law of this Circuit.

What ultimately stands out in the record is the fact that the prosecutor improperly read Dr. Legault's notes to the jury -- and unnecessarily since the doctor could have refreshed his recollection from the copy in his hands -- and then twice referred to them in his summation as being in evidence, without <u>even</u> limiting instruction.

CONCLUSION

Defendant respectfully submits that for the reasons set both above and in defendant's main brief the conviction below should be reversed.

Respectfully submitted,

WILLIAM MALONE

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<u>Attorney for</u>
<u>Jerry Carr, Jr.</u>
(Appointed by this Court)

November 10, 1969.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be delivered by hand to the office of the United States Attorney for the District of Columbia, 3820 U. S. Courthouse, Washington, D. C. 20001, this 10th day of November, 1969, a copy of the foregoing reply brief for the appellant.

William Malone

WILLIAM MALONE

November 10, 1969.